

sound principles. The refusal by the learned president to the defence counsel to address the court on a matter in which the learned president allowed the prosecution to address it on the face of it appears unjust and this I think was not a proper exercise of the discretion by the learned president. It was obviously unjust and it is consequently unnecessary to consider whether actually any prejudice was caused to the accused or not.

The record of the proceedings gives the impression that the learned president took the view that the prosecution had a right as it were to comment on the statement made by the accused from the dock and the learned president further seems to have held that the counsel for the accused could not address him at all on such a statement. I fail to understand how he arrived at that conclusion. I have already said that it is not necessary for me to consider whether there was any actual prejudice caused to the accused or not by such a decision of the learned president.

In the case of *Mahindar Singh v. Public Prosecutor*⁽⁹⁾ the accused's counsel was never given an opportunity of addressing the court at the close of the case. In the present case the accused's counsel was deprived of an opportunity of addressing the court on a part of the case for the defence. The principles applicable, however, are the same. Retrial was ordered in *Mahindar Singh's* case and I propose to do the same. The appeal is consequently allowed, convictions set aside and a retrial ordered.

Appeal allowed. Retrial ordered.

Solicitors: *Joseph & Son.*

LIM KIM CHAI & ANOR. v. FOO SEE FATT; GAN CHIN BAW & ANOR. v. FOO SEE FATT

[O.C.J. (Sharma J.) June 13, 1970]

[Muar — Civil Suit Nos. 59 and 60 of 1968]

Negligence — Res ipsa loquitur — Defence of inevitable accident — Onus on defendant.

Damages — Fatal accident — Loss of dependency — Award — Apportionment of.

In this case two cyclists had been knocked down by a van driven by the defendant. The cyclists were travelling on their correct side of the road at the time of the accident. The defendant's van had gone diagonally across to the other side of the road and had knocked down the two cyclists. The plaintiffs pleaded *res ipsa loquitur*. The defence relied on was that of inevitable accident. The defendant said that he had a momentary blackout at the time of the accident and consequent loss of consciousness and it was due to this that his van had gone to the wrong side of the road. He said he had been suffering from an attack of flu and cough which lasted for three days immediately prior to the date of accident.

Held: the onus of proving inevitable accident is on the defendant and on the facts of this case the defendant had not discharged this onus. The accident occurred because the defendant felt drowsy while driving and had fallen asleep and it was this act of falling asleep which was the cause of the accident.

A Cases referred to:-

- (1) *The Merchant Prince* (1892) P.D. 179, 189.
- (2) *Kay v. Butterworth* 61 T.L.R. 452.
- (3) *Browne v. De Luxe Car Services* [1941] 1 K.B. 549, 552.

CIVIL SUIT.

D. Murphy for the plaintiffs.

D. G. Ironside for the defendant.

Cur. Adv. Vult.

Sharma J.: On July 8, 1966 two cyclists, Tee Kim Yam and Teh Suan Yam, were cycling on the Batu Pahat/Rengit Road in the direction of Rengit when at about 12.30 p.m. both of them were knocked down by a motor van bearing registration number JC 7109 which was coming from the opposite direction. Both the cyclists were travelling on their proper side of the road at the time of the accident. Motor van JC 7109 was driven by the defendant. The defendant knocked down the two cyclists and thereafter ran into a telephone post. The defendant's vehicle had admittedly gone diagonally across to the other side of the road and beyond. Both the cyclists died as a result of the accident.

The plaintiffs in Civil Suit No. 59 of 1968 are the administratrix and the co-administrator respectively of the estate of Tee Kim Yam and the plaintiffs in Civil Suit No. 60 of 1968 are the administratrix and the co-administrator respectively of the estate of Teh Suan Yam.

The plaintiffs have in the circumstances of this case pleaded *res ipsa loquitur*. The only issue which is involved in this suit is the issue of inevitable accident which is contained in paragraph 3 of the statement of defence. It was very rightly conceded by Mr. Ironside, counsel for the defendant, that the burden of proving inevitable accident lay on the defendant. In order to do that he must either show what was the cause of the accident and satisfy the court that the result of that cause was inevitable. Fry L.J. in the case of *The Merchant Prince*⁽¹⁾ said:

"The burden rests on the defendants to shew inevitable accident. To sustain that the defendants must do one or other of two things. They must either shew what was the cause of the accident, and shew that the result of that cause was inevitable; or they must shew all the possible causes, one or other of which produced the effect, and must further shew with regard to every one of these possible causes that the result could not have been avoided. Unless they do one or other of these two things, it does not appear to me that they have shewn inevitable accident."

In the present suit, the defendant has endeavoured to show what he regards as the cause of the accident. According to him, he had an attack of flu and cough which lasted for three days immediately prior to the date of the accident, i.e. July 8, 1966. On the morning of that day, he says, he felt fit to drive the van and commenced his business trip in the van at 7.30 a.m. accompanied by the attendant, Lim Ah Kow (D.W. 2). The defendant was an assistant in a bakery business and had to make deliveries of biscuits during the course of his journey at various places. The defendant drove the van. According to him, he had covered a distance of only 54 miles between 7.30 a.m. and 12.30 p.m. when

the accident took place, but according to Dr. Chooi Sooi Lang (D.W. 3), the distance the defendant would have covered should be 87 miles and not 54 miles. The defendant admitted that July 8, 1966 was a hot day and the place where the accident took place was on a straight stretch of the road. He asserted that he had a momentary black-out, that such a thing had never happened to him before the date of the accident and that he had no reason to believe or suspect that such a thing could ever happen to him that afternoon and that it was solely due to this momentary black-out and consequent loss of consciousness that his van went to the wrong side of the road as a result of which alone the two deceased sustained the fatal injuries.

The defendant had tea and some biscuits for breakfast before he started on the journey at 7.30 a.m. and he had his lunch at about 12 noon at Pontian. At 1.50 p.m. on the day of the accident he made a report at the Rengit Police Station (A5). This report was in Malay and no interpreter was used. In this report, which was made one hour and 20 minutes after the accident, he said:

"...laju m/van saya lebeh kurang 30-32 b.s.j., masa itu saya rasa mata saya mahu tidur dan telah terbabas ke-sebelah kanan jalan dan telah terlanggar pada sa-orang penonggang bicycle laki2 sama ada China atau Melayu saya tidak tahu. m/van saya teros kedepan dan terlanggar pada wire pen-yokong tiang telephone di-sebelah kanan, jalan di-situ. Saya terus berhentikan m/van...."

The certified translation of this report is Exhibit A5T and the certified translation of that portion of the report which I have quoted reads:

"...the speed of my motor van was about 30-32 miles per hour. At that time I felt that my eyes were about to sleep and thus went off to the right-hand side of the road and knocked a male cyclist. I did not know whether he was a Chinese or a Malay. My m/van continued to proceed on and knocked against the supporting cable of a telephone post on the right-hand side of the road. I straightaway stopped the motor van and straightaway went to Rengit Police Station and lodged a report."

The last paragraph of Exhibit A5T reads:

"At 2.10 p.m. on 8.7.66 I finished making my report and cpl. 8545 read it over to me and found it to be correct and signed below the report."

The defendant in his examination-in-chief maintained that all he meant to convey to the corporal who took down his report was that he suddenly fainted and that he did not at any time feel that something abnormal was going to happen to him. If what the defendant says is true, then there was no negligence on his part. Mr. Ironside referred me to *Mazengarb's Negligence on the Highway* (4th Edition) at page 168 where the law on the subject is summarised thus:

"Although there is very little case law on the subject, it is clear on principle that if a driver has a sudden seizure — e.g. heart failure or an attack of *petit mal* — or faints or is hit by a stone or stung by a swarm of bees while at the wheel and an accident occurs, he should not be held to account...."

It may, however, appear from the evidence that in the state of his health a driver should not have attempted or been allowed to drive or that there was a moment of time when the attack was coming on which could have been used to bring the vehicle to a standstill. If so, the negligence will consist in driving or in allowing the car to be driven or in not stopping its progress when the driver became aware of

A the probability of the malady or sleepiness affecting him. For an accident due to his driving in a drowsy condition and 'sleeping' at the wheel he is liable."

It has been stressed upon me that I should accept the defence version as it is supported by the evidence of the attendant Lim Ah Kow (D.W. 2) and that of Dr. Chooi Sooi Lang (D.W. 3).

B The onus of proving inevitable accident is on the defendant and section 3 of the Evidence Ordinance defines when a fact is to be "proved", "disproved" and "not proved". *Halsbury* in his *Laws of England* (3rd Edition), Volume 15, paragraph 473, states:

C "In every system of jurisprudence it is recognised that before a fact is accepted and acted upon, it must be proved or otherwise established. Evidence is the foundation of proof with which it must not be confounded. Proof is that which leads to a conclusion as to the truth or falsity of alleged facts which are the subject of enquiry. Evidence, if accepted and believed, results in proof but it is not necessarily proof of itself."

D A fact is said to be "proved" when after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. A fact is said to be "disproved" when, after considering the matters before it, the court either believes that it does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist. A fact is said to be "not proved" when it is neither proved nor disproved. (See section 3 of the Evidence Ordinance, 1950).

E The standard of proof is that of a prudent man. The test in each case is, would a prudent man, after considering the matters before him, deem the fact in issue to be proved or disproved. In a matter of this kind the conscience of the court can never be bound by any rule but that which coming from itself dictates a conscientious and prudent exercise of its judgment.

F As far as the evidence of Dr. Chooi Sooi Lang is concerned, I have after careful consideration of the same come to the finding that it neither proves nor disproves the allegation that the accident was the result of a sudden black-out. He examined the defendant on July 15, 1966, i.e. seven days after the accident. The defendant seems to have gone to him to have his blood pressure checked up. It does look somewhat strange to me that the idea of having his blood pressure checked up should dawn on the defendant seven days after the day of the accident and it is somewhat further surprising that he should have chosen July 15, 1966 for examination of his blood pressure when D.W. 3 found it only to be 110/70. The defendant agreed that he was told by D.W. 3 that there was nothing wrong with him and that he was perfectly in normal health on July 15, 1966. The reasons given by D.W. 3 to support the theory that the defendant could have had a black-out, as described by him, were:

(a) the attack of flu from which the defendant had recovered only on the morning of July 8, 1966;

(b) the weakness resulting from such an attack;

- (c) the approximately 5 hours during which the defendant was engaged in driving the van;
- (d) the heat of the day; and
- (e) the poor ventilation in the van.

In cross-examination, however, D.W. 3 admitted that he would not have advised a patient of his to drive a van after three days of flu and that the defendant should not have driven the van in that condition immediately after the attack of flu. In fact D.W. 3 stated that if he himself had an attack of flu which had lasted for three days, he would not have driven 87 miles to see a patient of his as he would consider such an act not only risky to himself but also to the public. D.W. 3 agreed that the factors which were against the acceptance of the theory of a sudden black-out put forward by the defendant were:

- (a) the fact that one rarely felt dizzy or fainted while being seated;
- (b) the lunch taken by the defendant at about 12 noon would have tended to stop any tendency towards dizziness; and
- (c) the fact that the windows of the van were open would have reduced the chances of the defendant having any dizziness resulting from a poor ventilation in the van.

D.W. 3 also agreed that there was a possibility that the defendant had the opportunity to pull up and that it was quite likely that he might have felt drowsy after lunch on a hot day.

D.W. 3's evidence consequently neither proves nor disproves inevitable accident in view of the definition of "not proved" in section 3 of the Evidence Ordinance. I hold that in so far as the evidence of D.W. 3 is concerned, the defendant has not proved that the accident was due to any sudden or transient black-out as has been described by him. I have to consider not only the positive evidence and the *lacuna* in such evidence but also the probabilities and all the circumstances of the case.

The defendant had told his attendant Lim Ah Kow (D.W. 2) on the very night of the accident that he (the defendant) was suffering from a headache before he met with the accident. If that was so and bearing in mind that the defendant was down with flu for three days immediately prior to the accident, he was undoubtedly negligent in continuing to drive in such a state of ill-health as would reasonably have been a cause of danger to others using the same road. Neither the defendant nor D.W. 2 have impressed me as witnesses of truth. One has only to carefully go through their statements and the obvious contradictions made by them. I am not inclined to place much reliance on the testimony of the defendant or D.W. 2 as far as such testimony relates to the issue of an inevitable accident. The police report was made by the defendant soon after the accident and it is apparent from a bare perusal of the said report that the defendant was feeling sleepy before the accident. I find it as a fact and do so hold that the defendant felt drowsy and had for a short while fallen asleep and that it was this act of his falling asleep

A that was the cause of the accident. I also find and hold that the defendant knew that he was either about to fall asleep or was approaching a state where he might not be in a position to keep the vehicle under control either because of the feeling of an approaching attack of faintness or sleep over-powering him and that it was under those circumstances his duty to bring the vehicle to a stop. I consequently hold the defendant negligent and find him entirely to be blamed for the accident. (See *Kay v. Butterworth*⁽²⁾).

The defence of inevitable accident fails. In the case of *Browne v. De Luxe Car Services*⁽³⁾ Sir Wilfred Greene M.R. said:

C "...I do not find myself assisted by considering the meaning of the phrase 'inevitable accident'. I prefer to put the problem in a more simple way, namely, has it been established that the driver of the car was guilty of negligence?"

The only defence that was raised was the defence of inevitable accident and that defence has, in my view, failed. There is ample evidence pointing to the negligence of the defendant.

D It has been agreed by the counsel that, should the defendant be held liable, there should be judgment for the plaintiffs in Civil Suit No. 59 of 1968 for the following sums:

- (a) \$350 on account of costs of obtaining letters of administration.
- (b) \$350 on account of funeral expenses.
- (c) \$3,000 for loss of expectation of life to be paid to the estate of the deceased and to be distributed by the plaintiffs in accordance with law.

and

- F (d) \$15,000 to the dependants; it being agreed that the total general damages the plaintiffs are entitled to should be \$18,000.

It has also been agreed by the counsel that, should the defendant be held liable, there should be judgment for the plaintiffs in Civil Suit No. 60 of 1968 for the following amounts:

- G (1) \$350 on account of costs of obtaining letters of administration.
- (2) \$750 on account of funeral expenses.
- (3) \$3,000 for loss of expectation of life to be paid to the estate of the deceased and to be distributed by the plaintiffs in accordance with law.
- H and
- (4) \$8,000 to the dependants; it being agreed that the total general damages the plaintiffs are entitled to should be \$11,000.

I In Civil Suit No. 59 of 1968 there will consequently be judgment for the plaintiffs in the sum of \$18,700 and costs and in Civil Suit No. 60 of 1968 there will be judgment for the plaintiffs in the sum of \$12,100 and costs.

As far as the question of apportionment of the sum of \$15,000 for loss of dependency in Civil Suit No. 59 of 1968 is concerned, this will be apportioned as follows:

- | | |
|--|---------|
| (1) To Lim Kim Chai
(the widow of the deceased) | \$5,000 |
| (2) To Tee Chin Leong | \$3,500 |
| (3) To Tee Ai Hiok | \$3,500 |
| (4) To Tee Ai Kim | \$3,000 |

The share of the infants Tee Chin Leong, Tee Ai Hiok and Tee Ai Kim will be deposited with the public trustee in trust for the infants until they attain majority, or in the case of Tee Ai Hiok until she marries. There will be liberty to the mother of the infants to apply during the minority of the infants.

The sum of \$8,000 awarded for loss of dependency in Civil Suit No. 60 of 1968 will be apportioned as follows:

- | | |
|---|---------|
| (1) To Gan Ching Baw
(the widow of the deceased) | \$2,300 |
| (2) To Teh Ah Hong | Nil |
| (3) To Teh Ah Leng | \$ 300 |
| (4) To Teh Ah Kou | \$ 900 |
| (5) To Teh Ling Eh | \$2,100 |
| (6) To Teh Nya Enai | \$2,400 |

The share of the three infants Teh Ah Kau, Teh Ling Eh and Teh Nya Enai will be paid to the public trustee in trust for the infants until they attain majority. There will be liberty to the mother of the infants to apply during the minority of the infants. I understand that Teh Ah Leng has already attained majority.

Judgment for the plaintiffs.

Solicitors: *Murphy & Dunbar; Ironside & de Souza.*

CHIK BINTE ABDUL HAMID v. CHONG KEE SENG

(O.C.J. (Ibrahim J.) June 16, 1970)

[Kuala Trengganu — Civil Suit No. 19 of 1961]

Land Laws — Malay holding — Whether land Malay holding — Transfer of land — Allegation of fraud — Burden of proof — Notice to quit — Malay Reservations Enactment, 1360, s. 2, as amended by Trengganu Enactment No. 3 of 1951 — Settlement Enactment, 1356 — Land Enactment, 1357.

In this case the plaintiff claimed to recover possession of a piece of land and house at Kuala Dungun. She alleged that the said land was a Malay holding and therefore no transfer, charge or lease thereof to a non-Malay was permissible. She also alleged that the alleged transfer of the land to the defendant was effected by a fraud practised on her and all she had agreed was to allow the defendant to occupy the land for 10 years.

Held: (1) as the land was held under Akuan Menuntut Tanah, No. 409 which was a recorded interest of an occupier under a recorded possessory title under the Settlement Enactment and not a registered interest in an alienated land, under the Land Enactment the land was not a Malay holding under the Malay Reservations Enactment at the time when the alleged transfer was effected and before the Enactment was amended by Trengganu Enactment No. 3 of 1951;

(2) on the facts of this case the plaintiff had proved fraud and therefore the plaintiff had only agreed to permit the

A defendant to build two houses on the said land and occupy it for a period of only 10 years;

(3) as the period of 10 years had expired the position of the defendant was that of a tenant at will or that of a contractual licensee whose licence had expired and it was not necessary for the plaintiff to give a notice to quit at all;

(4) on the facts the plaintiff had given sufficient time to the defendant to vacate the land and judgment must therefore be given for the plaintiff.

B *Cases referred to:-*

(1) *Nederlandsche Handel-Maatschappij M.V. (Netherlands Trading Society) v. Koh Kim Guan* [1959] M.L.J. 173.

(2) *Nadchatiram Realities (1960) Ltd. v. Raman & Ors.* [1965] 2 M.L.J. 263.

(3) *Martinali v. Ramuz & Anor.* [1953] 2 All E.R. 392.

C CIVIL SUIT.

Dato' Bijaya (Chandran with him) for the plaintiff.

A. Wilson for the defendant.

Cur. Adv. Vult.

D **Ibrahim J.:** In this action the plaintiff is praying for an order as follows:

(i) The defendant do demolish the two shophouses on the said land Keterangan Register Mukim 1101 Lot No. 1655 Mukim of Kuala Dungun;

(ii) The defendant or any person or persons claiming through him do give up vacant possession of the said land Keterangan Register Mukim 1101 Lot No. 1655 to the plaintiff;

(iii) Costs of this suit.

In her statement of claim she alleges that she is the registered owner of the said land and that the defendant had built two shophouses on it. She had given notice to the defendant to vacate the land but the defendant had failed to do so and continues to be in wrongful occupation thereof. She also alleges that the said land is a Malay holding and thus no transfer, charge or lease thereof to a non-Malay is permissible.

G In his statement of defence the defendant alleges that he had purchased the portion of the said land on which the two houses stand and in support thereof he produced at the hearing an agreement dated August 28, 1949 (Exh. D5). He denies that the said land was at the material time a Malay holding and further alleges that the notice to vacate was bad in law and so of no effect. The defence of limitation was also raised in his statement of defence but it was subsequently abandoned.

H In her reply to the statement of defence the plaintiff raises the issue of fraud in respect of D5.

I An issue to be decided is whether the said land was or was not on August 20, 1949 (when D5 was made) a Malay holding within the meaning of the Malay Reservations Enactment No. 17 of 1360 for if it was so the purported transfer would be null and void by virtue of section 9(i) of the said Malay Reservations Enactment which provides that no such holding "shall be transferred, charged, leased or otherwise disposed of to any person not being a Malay."